Filed 1/8/19 P. v. Tyler CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. JUAN T. TYLER, Defendant and Appellant.	B278095 (Los Angeles County Super. Ct. No. LA072403)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael V. Jesic, Judge. Affirmed and remanded with directions.

James M. Crawford, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Stephanie A. Miyoshi and Allison H. Chung, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Juan Tyler of robbing and attempting to murder Emanuel Jones. Jones and his partner Rayvon Apolonio thought Tyler was going to pay them $25,000 for marijuana. Instead, Tyler and his brother Daynian Tyler pulled guns and robbed Jones and Apolonio. After robbing Jones, Juan Tyler shot him. Juan Tyler raises three points on appeal. The first two are invalid and we affirm the judgment. On point three, we remand with directions. Statutory citations are to the Penal Code.

I

We summarize evidence in favor of the party prevailing at trial. Jones drove Apolonio in a Hyundai to a rendezvous. They saw a silver sedan pull up with three or four people inside. Daynian Tyler and Juan Tyler left the silver sedan for the Hyundai. Daynian Tyler sat down in the Hyundai's back seat on the driver's side, behind Jones. Juan Tyler got in behind Apolonio. The Tylers drew guns and demanded marijuana. Jones and Apolonio handed over all eight pounds they had. Juan Tyler persisted, saying "give me everything," which Jones took to mean "my life, my car, my money, whatever I have on me."

Jones testified he responded "by fighting back." "With quickness," he got out of the car's driver door and went to the driver's side passenger door, which Daynian Tyler was opening. Jones pushed against the rear door to keep Daynian Tyler inside the car, but Tyler forced his way out anyway, gun in hand. There was a "scuffle," meaning Jones hit Daynian Tyler once in the face. The blow did not fell or stun Daynian Tyler but did inspire him to run to the silver sedan, throwing down his gun in flight. Jones did not chase Daynian Tyler but turned back toward the Hyundai.

Meanwhile, Juan Tyler also got out of the Hyundai. As Jones turned away from the fleeing Daynian Tyler and after Danian Tyler had separated from Jones and was some distance from him, Juan Tyler fired shots at Jones, hitting him once in the shoulder and once in the abdomen. Jones suffered collapsed lungs, spinal damage, and other injuries.

II

Juan Tyler first argues the trial court should have instructed the jury on a defense-of-another defense (CALCRIM No. 505), even though he did not rely on that theory at trial and his trial counsel did not request this instruction. At trial, Tyler's defense was he was not at the scene and witnesses claiming otherwise were wrong and not to be believed. On appeal, Tyler's theory is the jury, if instructed on the defense of defense of another, perhaps might have found he shot Jones to defend Daynian Tyler, whom Jones had punched.

We independently review jury instruction issues for legal error. (See *People v. Simon* (2016) 1 Cal.5th 98, 133.) A defendant in a criminal matter has a constitutional right to have the jury decide every material factual matter presented by the evidence. We resolve doubts about whether there is enough evidence to warrant a particular jury instruction in favor of the accused. A necessary instruction must be given when substantial evidence warrants it, but need not be given if only slight evidence is presented. The evidence must be strong enough to permit a reasonable jury to conclude facts underlying the instruction existed. This simply frees the court from an obligation to present theories the jury could not reasonably endorse. (*People v. Strozier* (1993) 20 Cal.App.4th 55, 62-63.) Substantial evidence is

evidence a reasonable jury could find persuasive. (*People v. Barton* (1995) 12 Cal.4th 186, 201 fn. 8.)

The requirement that Juan Tyler must actually have believed Jones had placed Daynian Tyler in imminent danger of death or great bodily injury is common to both two versions of the defense of defense of another. These two versions are as follows. Imperfect defense of another is when a defendant acts in the actual but unreasonable belief that another person is in imminent danger of great bodily injury or death. (See *People v. Simon*, *supra*, Cal.5th at p. 132 [self-defense].) Perfect defense of another applies when the defendant's belief is both actual and reasonable. (See *ibid* [self-defense].) Essential to both versions, then, is the requirement that Juan Tyler actually believed his brother was in imminent danger of death or great bodily injury. Imminent means immediate and present and not prospective or in the near future. An imminent peril is one that must be dealt with instantly. (*People v. Aris* (1989) 215 Cal.App.3d 1178, 1187, overruled on other grounds in *People v. Humphrey* (1996) 13 Cal.4th 1073, 1089.)

This requirement of actual belief dooms Tyler's argument. The trial court had no sua sponte duty to instruct on defense of another, because no substantial evidence supported this defense.

There was no evidence that, when he shot Jones, Juan Tyler actually believed Daynian Tyler was in imminent danger of death or great bodily injury. According to Jones's testimony, both the Tyler brothers had guns. Jones lacked weapons but hit Daynian Tyler once anyway. The blow was not enough to floor or daze Daynian Tyler, who immediately ran and gained distance from Jones. Jones turned away from Daynian Tyler rather than

pursue him. At the moment Juan Tyler fired, Daynian Tyler was in no danger.

Apolonio's testimony was consistent with but less detailed than Jones's.

Daynian Tyler offered no evidence to support the instruction. He testified under a grant of immunity and denied being in danger. He was the victim of Jones's attack, according to Juan Tyler's theory on appeal, but Daynian Tyler denied any confrontation with Jones. Daynian Tyler did not recall any episode involving marijuana or Juan Tyler shooting someone, testifying that the shooting suggestion "sounds very ridiculous."

No other eyewitness described the event. Tyler argues that his father told police that his son Juan shot Jones because "he was just protecting his brother. I would have done the same thing." No one claimed, however, that the father was at the shooting scene or had any personal knowledge of those events. This evidence was insubstantial.

Juan Tyler's appellate theory about defense of another thus founders on lack of evidence. Absent substantial evidence that Jones posed a serious threat to someone, no sua sponte duty existed. The trial court did not err by omitting an unsupported sua sponte defense-of-another instruction. (See *People v. Lam Thanh Nguyen* (2015) 61 Cal.4th 1015, 1052.)

Tyler cites the factually inapposite case of *People v. Vasquez* (2006) 136 Cal.App.4th 1176, 1178-1180. Defendant Vasquez was confined to a wheelchair and shot a man who was choking him. Unlike the assailant in *Vasquez*, Jones neither was strangling Daynian Tyler nor was gripping him and preventing his exit. Daynian Tyler successfully escaped all risk by running

away, unconstrained by a wheelchair or disability. Daynian Tyler faced no danger like the one that imperiled Vasquez.

Tyler also cites *People v. Barton, supra*, 12 Cal.4th 186, but *Barton* does not assist him. The *Barton* decision stated trial courts must instruct sua sponte on unreasonable self-defense only when substantial evidence shows the defendant killed in unreasonable self-defense, not when supporting evidence is only "minimal and insubstantial." (*Id.* at p. 201.) We apply *Barton*'s rule here: the trial court had no duty to instruct sua sponte on a theory unsupported by substantial evidence.

III

Juan Tyler's second ground for appeal is that his sentence for second degree robbery should have been stayed according to section 654 in that the robbery conviction arose from the same facts as the attempted murder conviction.

The jury found Juan Tyler guilty of second degree robbery (§ 211) of Jones (count 1) and Apolonio (count 2) and attempted willful, deliberate and premeditated murder (§§ 187, subd. (a), 664, subd. (a)) of Jones (count 3). As to all counts, the jury found true the allegations Tyler personally used and discharged a handgun, causing great bodily injury to Jones (§§ 12022.5, subd. (a)(1), 12022.53, subds. (b), (c) & (d)). It also found, as to counts 1 and 2, that Tyler personally inflicted great bodily injury on Jones (id., § 12022.7, subd. (a)).

The trial court sentenced Tyler to life in prison for the attempted murder plus 25 years to life for the discharge of a handgun causing great bodily injury; it stayed the other enhancements pursuant to section 654. For one robbery, the trial court imposed the lower term of 2 years plus 10 years for the discharge of a handgun, to run consecutively to the sentence on

count 1; it stayed the remaining enhancements pursuant to section 654. For the other robbery, the trial court imposed the lower term of two years plus a 10-year enhancement, to run concurrently with the sentences on counts 1 and 3, and stayed the remaining enhancements under section 654.

Section 654, subdivision (a), provides that "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

The test for section 654 is whether a course of criminal conduct is divisible or indivisible, which in turn depends on the intent and objective of the actor. If all offenses are indivisible and incidental to one objective, then a defendant may be punished for only one of the offenses. (*People v. Britt* (2004) 32 Cal.4th 944, 951-952.)

A divisible course of conduct, however, gives rise to more than one act within the meaning of section 654. If the defendant harbored multiple independent criminal objectives, that defendant may be punished for each statutory violation committed in pursuit of each objective, even though the violations shared common acts or were parts of an otherwise indivisible course of conduct. (*People v. Harrison* (1989) 48 Cal.3d 321, 335.)

The question whether section 654 applies is a factual determination for the trial court. Appellate courts accord broad latitude to this trial court determination. We uphold trial court factual determinations if substantial evidence supports it. (*People v. DeVaughn* (2014) 227 Cal.App.4th 1092, 1113.)

Tyler contends the trial court should have stayed the sentence for robbery under section 654, because his convictions for the robbery and attempted murder of Jones arose from the same set of facts and were an indivisible transaction: a confrontation over the marijuana and efforts to get away. Tyler maintains his attempted murder was not gratuitous but was part of the single criminal objective of robbery and escape.

Substantial evidence, however, supports the trial court's decision not to stay either count 1 or count 3 under section 654. (*People v. DeVaughn*, *supra*, 227 Cal.App.4th at p. 1113.)

As reviewed above, Daynian Tyler escaped from Jones and was running to a getaway car when Juan Tyler shot Jones. Jones was not threatening or hurting anyone when Tyler fired. The shooting did not further the robbery or enable the escape. It was gratuitous. (See *People v. Nguyen* (1988) 204 Cal.App.3d 181, 190-191.)

This case differs from *People v. Mitchell* (2016) 4 Cal.App.5th 349, 351, where robbery with use of a deadly weapon and assault with a deadly weapon arose from the same indivisible transaction.

IV

This case must be remanded because the law has changed since the court sentenced Tyler in 2016. The then-mandatory firearm enhancement now is optional. We remand for the trial court to exercise its new discretion.

Senate Bill No. 620 became effective since Tyler was sentenced. The Attorney General concedes this new law applies to Tyler but maintains remand would be futile because the trial court would never have exercised its discretion to reduce the sentence. (See *People v. Gutierrez* (1996) 48 Cal.App.4th 1894,

1896.) The trial court did display a degree of leniency, however, and said nothing to foreclose the possibility of further mercy. (See also *People v. Almanza* (2018) 24 Cal.App.5th 1104, 1109-1111.)

V

The abstract of judgment contains errors. The sentencing memorandum confused count 1 with count 3 and the trial court did not catch this error. Thus the abstract of judgment reflects a sentence of life with the possibility of parole on count 1, robbery, rather than count 3, attempted murder. Additionally, it erroneously states the sentences for the robberies are to run concurrently to that for the murder, rather than one to run concurrently and one to run consecutively. We order that the abstract be corrected. (*People v. Sharret* (2011) 191 Cal.App.4th 859, 864 [oral judgment controls any discrepancy with the minutes or the abstract of judgment]; *People v. Menius* (1994) 25 Cal.App.4th 1290, 1294-1295 [a sentence that is the result of clerical error in the sense of inadvertence, though committed by the judge, may be corrected at any time].)

DISPOSITION

The judgment of convictions is affirmed. The case is remanded with directions to the superior court to decide whether to strike or dismiss the enhancement under the provisions of section 12022.53, subdivision (h). If the court has modified the sentence by striking the enhancement under the provisions of section 12022.53, subdivision (h), the abstract of judgment must be suitably amended. The court also must correct the abstract of judgment to reflect the sentence actually imposed and must send a copy to the Department of Corrections and Rehabilitation.

WILEY, J.*

WE CONCUR:

ZELON, Acting P. J.

SEGAL, J.

---

* Associate Justice of the Court of Appeal, Second Appellate District, Division Eight, assigned to Division Seven, by the Chief Justice pursuant to article VI, section 6 of the California Constitution.